Structure and Function in Criminal Law

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General Editor's Introduction

In this original and distinctive book, Paul Robinson presents an integrated statement of the results of several years of criminal law theorising and of practical experience of working with and drafting criminal codes. It begins with an analysis of the existing structure of systems of criminal law in the Anglo-American tradition. This is followed by an exploration of the structure of criminal law in terms of its functions, identifying and elaborating the separate functions of articulating rules, establishing grounds of liability, and grading offences. The final part of the book develops some principles for drafting criminal codes using the insights gained, and two appendices contain actual drafts prepared on this basis. Anyone who has reflected on the organisation of the criminal law will find this a rewarding book which challenges assumptions and points new ways. For those charged with reform and/or codification of the criminal law, it sets out standards and distinctions which will command attention for many years to come. I am delighted that Paul Robinson has been able to write such a powerful book for the series.

Andrew Ashworth

Preface

During the past fifteen years I have struggled with the question of how best to organize criminal law: what is the interrelation among the rules and doctrines of criminal law? How can those interrelations best be described in a comprehensive conceptual framework? Inevitably, the inquiry came to face the question of what 'best' means in this context: what should be the guiding principle in conceptualizing criminal law? To track as closely as possible the distinctions shown to be most significant by moral philosophy? To replicate how common people intuitively decide issues of criminal liability and punishment? To provide the organizational system that most effectively performs the functions we want a criminal code to perform? To increase the rationality of the conceptualization that history has given us, recognizing how difficult it is in the real world to change something so fundamental as how lawyers and judges have come to conceptualize criminal law? Some combination of these goals?

This book claims to answer the first question: what is the interrelation among the rules and doctrines of criminal law? It offers several alternative answers to the second question: how can those interrelations best be described in a comprehensive conceptual framework? The need for alternative answers is created by the complexity of the third question: what should be the guiding principles in conceptualizing criminal law? People will not agree upon the answer to that question. Thus, to speak to a full range of people and goals alternative conceptualizations are needed.

The book's contribution is less in its new ideas and more in its pulling together into a coherent whole my fifteen years of thought on the subject. First was an attempt to organize the area of criminal law defences, in 'Criminal Law Defenses: A Systematic Analysis' (1982), which was later elaborated in *Criminal Law Defenses* (2 volumes, 1984). Then came a similar organizing expedition for offence definitions, in 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983), with Jane Grall. The final piece of the trilogy came in 'Imputed Criminal Liability' (1983), which argued for recognition of a class of doctrines that operate in the reverse of general defences and ought to be given equal prominence. Just as general defences exempt an actor from liability despite the satisfaction of offence elements, so these doctrines impose liability despite the absence of an offence element. In this present work, I claim that, taken together, these three efforts offer a comprehensive framework for criminal law. A few other articles incorporated here provide refinements on

important issues, most notably 'Competing Theories of Justification: Deeds v. Reasons' (1996).

This thread of work is the subject of Part II of this volume. As the Introduction explains, the broad approach is to improve upon, but generally to give deference to, the current structure and conceptualizations implicit in current law.

Part III gives no such deference. It pulls together conceptualization work written on a blank slate. First, 'Rules of Conduct and Principles of Adjudication' (1990) suggested that criminal law, and criminal codes in particular, serve several functions and that current conceptualizations are the poorer for ignoring those different functions. It offers a vision of how current doctrines could be reorganized better to serve each function. In part, its claim is that different doctrines serve different functions and that doctrines of similar function should be formulated analogously and should as a group be segregated from groups of doctrines serving other functions. The theory of that piece is worked out in full doctrinal detail in 'A Functional Analysis of Criminal Law' (1994). And that theoretical detail is translated in turn into criminal code drafting rules in 'Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication' (1996), with Peter D. Greene and Natasha R. Goldstein. That project, with the help of a large group of students, ultimately generated a sample draft criminal code to illustrate the drafting principles. Again, other pieces incorporated here took up special problems in this thread, most notably 'Should the Criminal Law Abandon the Actus Reus–Mens Rea Distinction?' (1993).

I think the whole offered in this volume provides insights that the collected pieces do not. I know that the process of producing the whole required me to refine some earlier claims and to rethink others.

Part of my hope here is to make a case for the importance of such conceptualization work generally. Sorting out the similarities and differences between specific doctrines often leads to reformulation of one or both. By defining the interrelation among doctrines, a conceptual framework suggests specific reforms, an effect well documented here.

But conceptual framework building also has a more subtle, and perhaps more important long-term effect of improving the quality and even the possibility of debate. Debate of criminal law issues without some degree of an articulated framework too often ends in an argument in which both sides misunderstand the significance of the other's arguments, and even the other's questions. Real debate can start only when a shared conceptual structure frames the issues in a way that all understand.

Further, public debate among scholars over criminal law's proper conceptual framework would lay bare the most fundamental points of disagreement and thereby set a valuable scholarly agenda. A developed consensus

from such public debate eventually would affect the way students are taught and the way code drafters and judges think about criminal law, and therefore the way criminal law rules are formulated and applied. Conceptualization is both the starting point for debate and the vehicle for refinement and reform.

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